SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 1125

STANDARD OIL COMPANY OF CALIFORNIA,
Appellant,

vs.

CHARLES G. JOHNSON, AS TREASURER OF THE STATE OF CALIFORNIA.

APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA.

STATEMENT AS TO JURISDICTION.

FELIX T. SMITH,
FRANCIS R. KIRKHAM,
SIGVALD NIELSON,
FRANK J. KOCKRITZ, JR.,
Counsel for Appellant.

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No. 1125

STANDARD OIL COMPANY OF CALIFORNIA,
A CORPORATION,
Appellant,

vs.

CHARLES G. JOHNSON, AS TREASURER OF THE STATE OF CALIFORNIA.
Appellee.

STATEMENT AS TO JURISDICTION.

Statement of the Case.

During the month of March, 1941, appellant sold several thousand gallons of gasoline to United States Army Post Exchanges located in California on Government reservations not under the exclusive jurisdiction of the Federal Government. The State of California collected a gasoline tax from appellant in respect of these sales under the Motor Vehicle Fuel License Tax Act (*infra*, p. 3. Appellant paid the tax under protest and brought this suit in the Superior Court for the County of Sacramento to recover the amount thereof, alleging (1) that the sales of gasoline to the Army Post Exchanges were exempt under

Section 10 of the Act, which provides that the tax shall not apply,

> "* * * to any motor vehicle fuel sold to the government of the United States or any department thereof for official use of said government, * * *"

and (2) that if the Act is construed and applied to impose a tax upon such sales it is unconstitutional as imposing a burden upon instrumentalities or agencies of the United States and subjecting them to regulation beyond the power of the State (Complaint, Pars. VII and VIII, Tr. 6).[1]

The State of California filed an answer admitting the facts alleged in the complaint. The trial court gave judgment on the pleadings for appellee, holding that post exchanges are not instrumentalities or agencies of the United States Government. No opinion was rendered. A copy of the court's conclusions of law (Tr. 23-24) is appended hereto as Appendix A.

Upon appeal, the Supreme Court of the State of California affirmed the judgment of the Superior Court. The opinion of that court, a copy of which is appended hereto as Appendix B, is not yet officially reported. It is unofficially reported in 19 Advance California Reports 125, and 119 P. (2d) 329.

Statutory Provisions Sustaining Jurisdiction.

The statutory provision believed to sustain the jurisdiction of this Court is Section 237(a) of the Judicial Code, as amended by the Act of February 13, 1925, and the Act of January 31, 1928 (28 U. S. C. 344(a), 861a).

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[1] References to the transcript are to the typewritten transcript of record upon which the case was reviewed by the Supreme Court of the State of California, and which is included in the transcript certified to this court.

Statute of the State Involved.

The statute of the state, the validity of which is involved, is the California Motor Vehicle Fuel License Tax Act (Cal. Stats. 1923, pp. 572, 573, 574, as amended by Cal. Stats. 1927, p. 1309; Cal. Stats. 1933, pp. 1636, 1637, and Cal. Stats. 1937, p. 2219). The material provisions of that act are as follows:

> "Sec. 3. A license tax is hereby imposed for the privilege of distributing, within the meaning of section 7 of this act, any motor vehicle fuel. Said license tax shall be according to or measured by the gallonage of motor vehicle fuel so distributed in this State and shall be at the rate of three cents for each gallon of such fuel refined, manufactured, produced, blended or compounded by such distributor in this State and so distributed by him in this State * * *."
>
> "Sec. 7. For the purposes of this Act all motor vehicle fuel sold, donated, consigned for sale, bartered or used shall be deemed to be distributed, * * *."
>
> "Sec. 10. The provisions of this act requiring the payment of license taxes shall not be held or construed to apply * * * to any motor vehicle fuel sold to the government of the United States or any department thereof for official use of said government, * * *."

Date of Judgment and of Application for Appeal.

The opinion of the Supreme Court of the State of California was filed November 29, 1941; its remittitur and judgment was filed December 30, 1941, on which day the judgment became final.

Rule XXX, sec. 1, of the Rules of the Supreme Court of the State of California;

Oakland v. *Pacific Coast Lumber etc. Co.*, 172 Cal. 332, 337;

Estate of Ross, 189 Cal. 317, 318.

The application for appeal was presented March 23, 1942.

Cases Believed to Sustain the Jurisdiction.

The cases believed to sustain the jurisdiction of this Court are:

Fiske v. *Kansas*, 274 U. S. 380, 385;
Dahnke-Walker Co. v. *Bondurant*, 257 U. S. 282, 288-290;
Breisch v. *Central R. R. of N. J.*, 312 U. S. 484, 489-491;
State Tax Comm'n v. *Van Cott*, 306 U. S. 511;
Minnesota v. *National Tea Co.*, 309 U. S. 551;
Red Cross Line v. *Atlantic Fruit Co.*, 264 U. S. 109, 120;
Tipton v. *Atchison Ry. Co.*, 298 U. S. 141, 151-155.

Raising the Federal Questions.

The complaint in the trial court alleged that the sales in respect of which the taxes were collected were made to United States Army Post Exchanges (Complaint, Par. IV, Tr. 2); that the post exchanges were organized, owned and operated in accordance with Army Regulations promulgated by the Secretary of War pursuant to the Act of July 15, 1870 (16 Stat. 319) as amended by the Act of March 1, 1875 (18 Stat. 337; Complaint, Par. VI, Tr. 5-6; copies of the Regulations were attached to and made a part of the complaint, Tr. 9-20). The complaint further alleged (Pars. VII and VIII, Tr. 6):

"VII

Said sales of gasoline to United States Army post exchanges are not subject to the motor vehicle fuel license tax because such sales were of motor vehicle fuel sold to the Government of the United States, or a department thereof, for official use of said government

and are, therefore, specifically exempted from the tax by section 10 of the Motor Vehicle Fuel License Tax Act.

VIII

Said sales of gasoline to United States Army post exchanges are not subject to the motor vehicle fuel license tax because such sales were made to instrumentalities and agencies of the United States. If said Motor Vehicle Fuel License Tax Act properly construed and applied purports to impose a tax upon sales to the United States Army post exchanges said act is unconstitutional and void in that it imposes a burden upon instrumentalities and agencies of the United States prohibited by the Constitution of the United States and subjects instrumentalities and agencies of the United States to regulation beyond the power of the State of California to impose."

Under California practice an appeal is taken by a notice of appeal (Tr. 27), and the questions to be reviewed are set forth in the briefs of the parties. Appellant's brief in the Supreme Court of California raised the Federal questions herein discussed, and the Supreme Court of California expressly considered and decided these questions (Opinion, Appendix B).

Statement of Grounds Upon Which It Is Contended the Questions Involved Are Substantial.

A. *The California Motor Vehicle Fuel License Tax Act as Construed and Applied in This Case is Unconstitutional.*

(1) *A state tax upon transactions of the United States Government or its instrumentalities is invalid.*

In upholding the validity of the Motor Vehicle Fuel License Tax Act as applied to the transactions involved in this case, the Supreme Court of the State of California held

that the State of California has the power to impose an excise tax upon the transactions of instrumentalities and agencies of the Federal Government. It is well settled that a state may not impose a tax upon the transactions of the United States Government or its instrumentalities and agencies.

See:

McCulloch v. *Maryland*, 4 Wheat. 316;
Osborn v. *United States Bank*, 9 Wheat. 738, 865;
Willcuts v. *Bunn*, 282 U. S. 216, 226-227;
Helvering v. *Therrell*, 303 U. S. 218, 223;
Helvering v. *Gerhardt*, 304 U. S. 405, 411, 413;
Alabama v. *King & Boozer*, 314 U. S. 1, 8-9.

It is submitted that the recent decision in *Alabama* v. *King & Boozer*, *supra*, which is the latest pronouncement of this court on this subject, sustains this doctrine. That case involved the imposition of the Alabama sales tax upon sales of lumber to cost-plus-a-fixed-fee contractors. Since the Supreme Court of Alabama had considered the tax as one imposed upon transactions this Court assumed that the true tax incidence was the sale to the Government contractor. The Government disclaimed any contention that the Constitution prohibited the tax because the tax was passed on economically as a part of the construction cost to the Government (314 U. S., 8). Instead, the contention of the Government was that the tax was invalid because it was laid in such manner that its legal incidence was upon the Government rather than upon its contractor, because the contractor "so acted for the Government as to place it in the role of a purchaser of the lumber" (314 U. S., 9). This court said (314 U. S., 9):

> "The soundness of this conclusion turns on the terms of the contract and the rights and obligations of the parties under it."

It is thus clear that this recent case recognizes and reaffirms the rule that a State may not impose taxes upon the transactions of instrumentalities of the Federal Government. The fact that this Court held that cost-plus-a-fixed-fee contractors are not instrumentalities of the Federal Government, and therefore that the taxing act as construed and applied was not unconstitutional, in no way detracts from this conclusion.

(2) *The tax here involved was upon transactions of United States Army Post Exchanges.*

In contrast to the situation involved in the *King & Boozer* case, the tax in this case is imposed upon transactions of Government instrumentalities, the United States Army Post Exchanges. In *Standard Oil Co.* v. *California*, 291 U. S. 242, this court considered the same taxing Act as is here involved and expressly held that it imposes an excise tax UPON TRANSACTIONS. That case involved the question whether the State of California could constitutionally impose the tax upon sales of gasoline made within the territorial limits of the San Francisco Presidio. In determining the effect of the California Act, this Court held that it imposes "taxes in respect of sales and deliveries" and concluded that in operation it was a "tax upon transactions" (p. 244).[2]

(3) *United States Army Post Exchanges are Government Instrumentalities.*

United States Army Post Exchanges are organized, owned and operated in accordance with Army Regulations issued by the Secretary of War with the sanction of the

[2] The power of this court independently to determine the incidence of a state exaction when claims of Federal immunity are made is well settled. For a recent statement of the rule, see *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435, 443-444.

President as Commander in Chief of the Army.[3] These regulations are issued pursuant to federal statutes,[4] and have the force of law.[5] They direct every step in the formation, ownership, and operation of the exchanges.[6]

The commanding officer of the post has the full responsibility for the operation of the post exchange. He is assisted by the post exchange council, consisting of the post exchange officer and the commanding officers of the unit members.[7] These men perform their duties, not as volunteers, but as a part of their official duties.[8] The members of the post exchange are companies or similar units stationed at the post, and not individual soldiers.[9] No part of the profits of the exchange can be distributed to any individual for personal or private use;[10] they may be used only for governmental purposes.[11]

Post exchanges are authorized to use Government supplies [12] and to occupy buildings constructed and maintained by the Federal Government and equipped with federal

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[3] Tr. pp. 5, 6, 21.

[4] 16 Stat. 319; 18 Stat. 337.

[5] *United States* v. *Query*, 37 F. Supp. 972, 975 (Aff'd. 121 F. (2d) 631; cert. den. — U. S. —; 62 Sup. Ct. 295);

Henry Woog, Administrator, v. *The United States*, 48 Ct. Cl. 80, 88, 89;
Thomas B. Dugan v. *The United States*, 34 Ct. Cl. 458.

See:

Smith v. *Whitney*, 116 U. S. 167, 181;
Gratjot v. *United States*, 45 U. S. 80, 117, 118;
F. T. Dooley Lumber Co. v. *United States*, 63 F. (2d) 384; cert. den. 290 U. S. 646.

[6] Tr. pp. 9-20.

[7] A. R. 210-65, par. 16 c, Tr. p. 9.

[8] *United States* v. *Query*, 37 F. Supp. 972, 974.

[9] A. R. 210-65, par. 8, Tr. p. 9.

[10] *Henry Woog, Administrator*, v. *The United States*, *supra*, pp. 87, 88.

[11] A. R. 210-65, par. 9, Tr. p. 9.

[12] A. R. 210-65, par. 59, Tr. p. 9.

funds;[13] their mail is carried by the Government free of charge;[14] their business messages are transmitted free of charge over telegraph and cable lines or radio owned and operated by the War Department;[15] their officers are entitled to the legal advice and services of the United States Attorney to protect the rights and interests of the exchanges.[16] Congress has periodically appropriated funds for the construction of equipment and maintenance of post exchange buildings.[17]

The President of the United States and the heads of the various departments of the United States, including the Attorney General, the Comptroller of the Treasury, the Comptroller General, the Postmaster General, the Secretary of War, the Secretary of the Navy, and the Commissioner of Internal Revenue, have in many instances held that post exchanges are federal instrumentalities. (See: *United States* v. *Query*, 37 F. Supp. 972, 976.)

In the light of the foregoing we submit that Army Post Exchanges clearly are instrumentalities of the Federal Government. As the court said in *Falls City Brewing Co.* v. *Reeves*, 40 F. Supp. 35, 39-40:

> "There can be no real doubt but that the Post Exchange as it is presently operated under army regulations, promotes in a large measure the welfare of the military personnel and that except for such operations the Government would itself be called upon to supply such facilities. Considered in this light it is certainly a

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[13] *Falls City Brewing Co.* v. *Reeves*, 40 F. Supp. 35, 39.

[14] A. R. 210-65, par. 73, Tr. p. 9.

[15] *United States* v. *Query*, 37 F. Supp. 972, 974.

[16] A. R. 210-65, par. 81 d, Tr. p. 9.

[17] 32 Stat. 937, 938; 33 Stat. 270; 33 Stat. 836; 34 Stat. 253, 1169; 35 Stat. 119, 516, 744; 36 Stat. 255, 1050; 37 Stat. 582, 619, 715; 38 Stat. 364, 1076; 39 Stat. 636; 40 Stat. 56, 195, 363, 479, 830, 862, 1029; 41 Stat. 118, 963, 1184; 42 Stat. 83, 719, 1056, 1167, 1380; 43 Stat. 480, 711, 895; 44 Stat. 190, 256, 1108; 45 Stat. 49, 329, 1352.

subordinate or auxiliary agency and falls easily within the accepted definition of an instrumentality of the United States."

The following cases have held that post exchanges are Government instrumentalities:

United States v. *Query*, 37 F. Supp. 972; affirmed 121 F. (2d) 631; cert. den. — U. S. —; 62 Sup. Ct. 295;

Falls City Brewing Co. v. *Reeves*, 40 F. Supp. 35 supra;

Henry Woog, Administrator, v. *The United States*, 48 Ct. Cl. 80, 88-89;

Thomas B. Duggan v. *The United States*, 34 Ct. Cl. 458;

Post Exchange, 31st Infantry v. *Grover C. Keeney*, (Reg. No. 30,920, Aug. 20, 1929, Supreme Court of the Philippine Islands).

Other cases have reached a contrary result:

Pan American Petroleum Corp. v. *State of Alabama*, 67 F. (2d) 590;

Thirty-first Infantry Post Exchange v. *Posadas*, 54 Phil. Rep. 866;

People v. *Standard Oil Co.*, 218 Cal. 123;

Keane v. *United States*, 272 Fed. 577.

In the instant case, the California Supreme Court relied upon the decision of the Circuit Court of Appeals for the Fourth Circuit in the *Keane* case, last above cited. That case, decided in 1921, was not followed by the same court in its recent decision in *United States* v. *Query*, 121 F. (2d) 631, holding that post exchanges are instrumentalities of the Federal Government.

This Court has never ruled on the question. Certiorari was denied, however, in *United States* v. *Query*, supra (November 17, 1941, — U. S. —, 62 Sup. Ct. 295). Cer-

tiorari was also denied in *Thirty-first Infantry Post Exchange* v. *Posadas*, supra (283 U. S. 839), where the court reached a conclusion contrary to that reached in the *Query* case.

We respectfully submit that the federal questions presented on this appeal clearly are substantial. They are, moreover, questions of exceptional public importance at the present time. The activities of post exchanges under the present emergency are rapidly increasing. These activities raise questions of liability under the many excise tax statutes of the various States. While the amount involved in this case is nominal, the decision herein will be controlling in the disposition of other pending cases involving many thousands of dollars. The question whether post exchanges are instrumentalities of the United States is also of unusual importance at the present time because of its bearing upon recent legislation of Congress relating to state sales, use and income taxes. The Act of October 9, 1940, the so-called Buck Act (54 Stats. 1059, 4 U. S. C. 15),[18] specifically exempts from its provisions the transactions of "the United States or any instrumentalities thereof." The question whether post exchanges are Government instrumentalities must, therefore, be determined before the problems associated with this Act can be set at rest. The need of a clarifying decision is strikingly emphasized by the fact that

[18] This Act provides that no person shall be relieved of liability for payment of any State sales or use tax on the ground that the sale or use with respect to which the tax is levied occurred within an area over which the Federal Government has exclusive jurisdiction (like the Presidio of San Francisco involved in *Standard Oil Co.* v. *California*, 291 U. S. 242), and that no person shall be relieved of liability from state income tax by reason of his residing within or receiving income from transactions occurring or services performed within such area. The Act specifically exempts the transactions of the United States and any instrumentality thereof.

Congress, in passing this legislation, was itself uncertain as to the character of post exchanges.[19]

With the law in its present unsettled condition, confusion and uncertainty exist with respect to the obligations of taxpayers and of state taxing officials under numerous taxing acts of the State of California and of other states.

B. *The Supreme Court of California, in Holding That Section 10 of the California Motor Vehicle Fuel License Tax Act Does Not Exempt Sales of Gasoline to United States Army Post Exchanges, Based Its Decision Upon an Erroneous Ruling as to Federal Law. This Court Has Power to and Should Correct This Erroneous Decision of an Important Federal Question.*

The question whether section 10 of the California Act by its terms exempts taxes on sales to Army Post Exchanges is, in the ultimate, a question of state law. The California Supreme Court in this case, however, based its ruling as to the meaning of the statute ENTIRELY upon its

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[19] The committee reports indicate that Congress did not wish to characterize post exchanges as Government instrumentalities or otherwise without a decision of this court. We quote from "Application of State Sales, Use, and Income Taxes to Transactions in Federal Areas" (Senate Report dated May 16, 1940, to accompany H. R. 6687, pp. 3-4):

"* * * tangible personal property purchased from a commissary or ship's store by an Army or Naval officer or other person so permitted to make purchases from such commissary or ship's store, is exempt from the State sales or use tax since the commissary or ship's store is an instrumentality of the United States and the purchaser is an authorized purchaser. If voluntary unincorporated organizations of Army and Navy personnel, such as post exchanges, are held by the courts to be instrumentalities of the United States, the same rule will apply to similar purchases from such organizations; but if they are held not to be such instrumentalities, property so purchased from them will be subject to the State sales or use tax in the same manner and to the same extent as if such purchase was made outside a Federal area. It may also be noted at this point that if a post exchange is not such an instrumentality, it will also be subject to the State income taxes by virtue of section 2 of the committee amendment."

decision of the federal question whether post exchanges are Government instrumentalities. That is to say, in so far as its decision involved the construction of the statute, the court held that section 10 exempts sales to "instrumentalities of the United States," and then, having so construed the statute, turned its ruling entirely upon its decision of the question whether post exchanges are Federal instrumentalities UNDER THE APPLICABLE PROVISIONS OF FEDERAL LAW. Its determination of this question depended upon the construction and application of federal statutes,[20] the Army Regulations issued thereunder,[21] and the decisions of the federal courts construing these statutes and regulations. Among other things, the court said (Appendix B, pp. 22, 23):

> "We do not find that the Supreme Court of the United States has ever directly passed upon the legal status of military post exchanges, yet the question has been before it on three different occasions: * * *
>
> * * * * * * *
>
> It seems to us after a study of the authorities upon the question before us, that the great weight of authority is in favor of the ruling of the trial court, holding that an army post exchange is not an instrumentality or department of the federal government, but, on the other hand, 'is an organization largely engaged in business of a private nature and that sales to it should not be beyond the reach of the taxing power of the state wherein it is located.'"

It is thus clear that the Supreme Court of California, in so far as it held inapplicable the exemption provided in section 10, was applying "federal law * * * to a solution of a state's problems" (*Breisch* v. *Central R. R. of*

[20] 16 Stat. 319, 18 Stat. 337, supra, p. 8.

[21] Supra, pp. 7 to 9.

N. J., 312 U. S. 484, 491), and that its decision depends "altogether on a misconception of federal law" (Id., p. 491).

It is settled that in these circumstances this Court has power to review and to decide the federal question upon which the decision of the state court was based, and thereafter to remand the case for such further action as may be deemed appropriate by the state court.

Breisch v. *Central R. R. of N. J.*, supra;
State Tax Comm'n v. *Van Cott*, 306 U. S. 511;
Minnesota v. *National Tea Co.*, 309 U. S. 551;
Tipton v. *Atchison Ry. Co.*, 298 U. S. 141, 151-155;
Red Cross Line v. *Atlantic Fruit Co.*, 264 U. S. 109, 120.

Conclusion.

We respectfully submit that the federal questions involved are substantial and are of exceptional public importance; that this Court has jurisdiction of the appeal.

Dated: March 23, 1942.

Respectfully submitted,

FELIX T. SMITH,
FRANCIS R. KIRKHAM,
SIGVALD NIELSON,
FRANK J. KOCKRITZ, JR.,
Counsel for Appellant.

EXHIBIT A.

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF SACRAMENTO.

No. 63124—Dept. 3.

STANDARD OIL COMPANY OF CALIFORNIA, a Corporation, *Plaintiff*,

vs.

CHARLES G. JOHNSON, as Treasurer of the State of California, *Defendant*.

Conclusions of Law.

This cause came on regularly for trial on the 5th day of May, 1941, before this court, plaintiff being represented by Messrs. Pillsbury, Madison & Sutro, and defendant being represented by Earl Warren, Attorney General of the State of California, and H. H. Linney and Adrian A. Kragen, deputies attorney general; and all of the facts having been admitted and the evidence being closed, and the court being fully advised in the premises and having rendered its decision, now makes its conclusions of law.

From the facts as appearing by the pleadings of the parties herein filed, the Court makes the following its

Conclusions of Law.

I.

That Post Exchanges organized under the provisions of Army Regulations No. 210-65 and No. 21-65C3, as well as amendments to said regulations, are not instrumentalities of the United States Government.

II.

That Post Exchanges organized under the provisions of Army Regulations No. 210-65 and No. 210-65C3, as well as

amendments to said regulations, are not agencies of the United States Government.

III.

That a sale of motor vehicle fuel to a Post Exchange is not a sale to the Government of the United States or any department thereof for official use of said government within the meaning of section 10 of the Motor Vehicle Fuel License Tax Act.

IV.

That plaintiff is not entitled to judgment in the sum of $526.08, nor in any other amount, and defendant is entitled to judgment for his costs of court herein incurred.

MALCOLM C. GLENN,
Judge of the Superior Court.

EXHIBIT B.

Endorsed: Filed Nov. 29, 1941. B. Grant Taylor, Clerk, by W., S. F. Deputy.

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA.

IN BANK.

Sac. No. 5493.

STANDARD OIL COMPANY OF CALIFORNIA, a Corporation, *Plaintiff and Appellant,*

vs.

CHARLES G. JOHNSON, as Treasurer of the State of California, *Defendant and Respondent.*

During the month of March of the present year the Standard Oil Company of California, plaintiff herein, sold several thousand gallons of gasoline to the United States Army Post Exchanges located on recently acquired govern-

ment reservations, not under the exclusive jurisdiction of the federal government, at Camp McQuaide, Watsonville, California, Campo, California, and Seeley, California. None of said post exchanges was, at any of the dates on which said sales were made, located on any United States reservation over which the federal government had exclusive jurisdiction to legislate on these sales of gasoline or other merchandise. Said post exchanges were organized and owned at all times herein mentioned, and were operated and did business under Army Regulations No. 210-65, of date June 29, 1929, and Army Regulations 210-65, C 3, of date March 9, 1940.

Plaintiff paid a tax on said sales amounting to the sum of $526.08 to the State of California. Said payment was made under protest and was accompanied by a verified written demand for the repayment to plaintiff of said sum on the ground that said tax was illegal for the reasons stated in said protest and demand. The reasons so stated were that said gasoline was sold to the United States Government or a department thereof for official use and was therefore exempt from the tax under section 10 of the Motor Vehicle Fuel License Tax Act; and furthermore, that the State of California is without right or authority to impose a tax on gasoline sold to post exchanges since they are instruments and agencies of the federal government. The officials of the state refused to acquiesce in the demand of plaintiff, and no part of said sum of $526.08 has been repaid to plaintiff. Thereupon plaintiff instituted this action against the defendant, the Treasurer of the State of California, to recover said amount. A trial was had and judgment was rendered in favor of the defendant, and plaintiff has appealed therefrom.

There is no dispute as to the facts. The controversy between the parties hereto involves simply questions of law, and they may be briefly stated as follows: Has the State of California the right and power to impose such tax on gasoline sold to the United States Army Post Exchanges; and if the state has the right to impose such a tax, have sales to army post exchanges been exempted from the payment thereof by section 10 of the Motor Vehicle Fuel License Tax Act?

This action in many of its essential features is like the case of People *v.* Standard Oil Company of California, 218 Cal. 123, 22 Pac. (2d) 2. That case arose out of sales of gasoline by the Standard Oil Company to United States post exchanges located within the Presidio military reservation at San Francisco. The Standard Oil Company in that case refused to pay the tax, and the action was brought to compel its payment. The tax in that case and the tax in the present case were levied and imposed under practically the same statute of this state. Our attention has not been called to any material change in the legal status of military post exchanges since the rendition of the decision in that case. So what was said by this court in that case upon the questions involved in the present action would be most persuasive of the decision of those questions.

In that case it was contended by the Standard Oil Company that sales made to military post exchanges were exempt from the state tax by virtue of the provisions of section 10 of the state statute hereinbefore referred to. In reply to the contention that "a sale to the army post exchange is a sale to a department of the government of the United States for official use of said government," our former opinion held at page 126: "Manifestly these sales are neither to a 'department' of the government nor for official use. The gasoline was sold to the exchange for resale to certain classes of persons for their private consumption. We have no hesitation in concluding that the legislative intent was to include the sales in question in computing the tax. But these observations do not determine the cause."

The decision then passes to a consideration of the nature of army post exchanges and of the power of the state to tax sales made to such exchanges, and upon that question concludes at page 128: "From these and other observations that might be made, touching the nature of the organization of an army post exchange, we are of the opinion that it is an organization largely engaged in business of a private nature and that sales to it should not be beyond the reach of the taxing power of the state wherein it is located and that it is not one of those agencies through

which the federal government directly exercises its constitutional or sovereign power."

We further held in that opinion that the tax on such sales was collectible even though the sales were made within the territorial limits of the Presidio, over which the State of California had exclusive legislative jurisdiction. An appeal was taken to the Supreme Court of the United States, and the judgment of this court was reversed on the ground that the sales were made without the jurisdiction of the state and "within territory subject only to the control of the United States". [Standard Oil Company *v.* California, 291 U. S. 242, 54 S. Ct. 381, 78 L. Ed. 775.] No reference was made in the opinion of the United States Supreme Court to any question decided in our opinion except the one involving territorial jurisdiction over the place where the sales were made. That portion of our decision holding that a military post exchange was not an instrumentality or department of the federal government, and that sales of gasoline to it were subject to the statutes of this state, was unaffected by the decision of the Supreme Court of the United States and must stand as the latest expression of this court upon those two questions, which are the only questions involved in this appeal.

The conclusion at which we arrived in the Standard Oil Company case, as hereinbefore set forth and which was not considered or passed upon by the Supreme Court of the United States, finds support in the decisions of the federal courts and in those of the United States Court of Claims, although the cases considering that question are not without conflict.

For a reversal of the judgment herein in favor of the respondent, the appellant cites and relies upon the following cases: Dugan *v.* United States, 34 Ct. Cl. 458; Woog, Administrator *v.* United States, 48 Ct. Cl. 80; Post Exchange, 31st Infantry *v.* Keeney, Reg. No. 30,920, decided August 20, 1929, Supreme Court of the Philippine Islands; United States *v.* Query, 21 Fed. Supp. 784; United States *v.* Query, 37 Fed. Supp. 972; and United States *v.* Cordy, 58 Fed. (2d) 1013.

It may be conceded that the Dugan and Woog cases support the contention of appellant, and the same may be said

respecting the Keeney case from the Supreme Court of the Philippine Islands, although the last-mentioned case may have been overruled by the case of Thirty-First Infantry Post Exchange *v.* Posadas, 54 Phil. Rep. 866, hereinafter referred to. The cases of United States *v.* Query, 21 Fed. Supp. 784, and United States *v.* Cordy, supra, are readily distinguishable from our present case. While the earlier Query case was decided by a court composed of three judges and the questions involved therein were thoroughly and carefully considered, it involved the right of the State of South Carolina to tax a Civilian Conservation Corps camp exchange. Such a camp had its existence by virtue of congressional legislation and federal funds were used to pay the expense in connection with its conduct, operation and maintenance. As shown by our decision in the Standard Oil Company case, supra, an army post exchange, "is not instituted by the aid of funds from the United States nor are its avails paid into the treasury. * * * Neither the government nor the officers of the post wherein the exchange is located are liable for its debts." [218 Cal. 128.] The case of United States *v.* Cordy, supra, involved the right of the State of Maryland to levy a tax upon the sale of gasoline to a "Y" military post exchange on a military reservation over which the State of Maryland had ceded exclusive jurisdiction to the United States Government. That case involved the precise point decided by the United States Supreme Court in Standard Oil Company *v.* California, supra. The later Query case, 37 Fed. Supp. 972, was also a decision by a court of three judges and unquestionably supports the position of appellant. It was decided in March of this year. It contains an exhaustive review of the authorities bearing upon the legal status of army post exchanges and holds that they are federal instrumentalities and immune from state taxation.

As against these authorities in favor of the appellant, the respondent relies upon two decisions of the circuit court of appeal and one from the Supreme Court of the Philippine Islands. In the first of these cases, Keane *v.* United States 272 Fed. 577, Keane was charged with conspiracy to defraud the United States by padding invoices for meat sold by him to an army post exchange. He ap-

pealed from a judgment of conviction and the circuit court of appeal reversed the judgment, holding at page 588: "Clearly the post exchange described in the indictment in this case is not such a lawful department of Government. Therefore this post exchange is not such an institution as that a fraud upon the United States can rise or be involved in any transaction concerning it, * * *" While this decision was by a divided court, it is not shown that any appeal was taken therefrom. Apparently the government was satisfied with the conclusion reached therein.

Pan-American Petroleum Corporation *v.* State of Alabama, 67 Fed. (2d) 590, a decision of the circuit court of appeal and the second case relied upon by respondent, involved the right of the State of Alabama to impose a tax upon gasoline sold to a military post exchange. After pointing out that the tax was not on the sale, but upon the withdrawal of the gasoline from storage, the court stated at page 596: "Furthermore, a post exchange is, of course, not the government; nor is it a department or instrumentality thereof. On the contrary, a post exchange is a voluntary, unincorporated, co-operative association of army organizations in which all share as partners in the profits and losses. The government has no share in the profits, and is not bound by the losses. We are therefore of opinion that sales made by appellant to the post exchanges * * * are not exempt from the state excise taxes. People *v.* Standard Oil Co. (Cal. Sup.), 22 P. (2d) 2." A petition for a writ of certiorari to review this decision was denied. [291 U. S. 670.]

The third case relied upon by respondent in support of the judgment is the case of Thirty-First Infantry Post Exchange *v.* Posadas, supra. It involved the right to collect a tax levied by the local government upon sales made to army post exchanges and "ship's stores". [The latter are organized within the navy in the same manner and for the same purpose as post exchanges are established in the army.] The court sustained the tax in the following language: "We rule that an Army Post Exchange, although an agency within the United States Army cannot secure exemption from taxation for merchants who make sales to the Post Exchange." The United States Supreme Court

denied a petition to review this decision by certiorari. [283 U. S. 839.] This decision would apparently overrule the case of Post Exchange, 31st Infantry *v.* Keeney, supra, decided by the Supreme Court of the Philippine Islands and relied upon by the appellant.

We do not find that the Supreme Court of the United States has ever directly passed upon the legal status of military post exchanges, yet the question has been before it on three different occasions: First, in the Thirty-First Infantry Post Exchange *v.* Posadas, supra, when it declined to review the judgment of the Supreme Court of the Philippine Islands, involving a tax on merchandise sold to a post exchange; Second, in our own case of Standard Oil Company *v.* California, supra, where it held the tax void because the same was made within territory over which this state had ceded full legislative authority to the United States, but declined to pass upon the legal status of an army post exchange, that is, whether it is or is not a department or instrumentality of the federal government; and Third; in the case of Pan-American Petroleum Corporation *v.* State of Alabama, supra, wherein the circuit court of appeal sustained a tax levied by the state upon sales of gasoline made to a post exchange.

In a very recent decision of the Board of Tax Appeals for the District of Columbia, in a proceeding entitled "Post Exchange, The Army War College *v.* District of Columbia," decided July 24, 1941, a tax assessed by the Assessor of the District of Columbia upon two automobiles belonging to said post exchange was sustained. After an extensive review of all the authorities cited above and many others, the board of tax appeals arrived at the following conclusion: "After giving consideration to the decisions, upon which the petitioner and respondent rely, and a study of the Army Regulations pertaining to post exchanges, the Board is of the opinion that the petitioner is not an agency, instrumentality or department of the United States, but is a voluntary cooperative association of army organizations in which all share as partners in the profits and losses, and in which the United States has neither a share in the profits, nor liability for the losses. The Board realizes that there are authorities opposed to this ruling, but believes that the

reasoning of the decisions which support the Board's conclusion is more persuasive. That being so, it follows that the tax here involved was not erroneously collected by the District from the petitioner. * * *"

It seems to us after a study of the authorities upon the question before us, that the great weight of authority is in favor of the ruling of the trial court, holding that an army post exchange is not an instrumentality or department of the federal government, but, on the other hand, "is an organization largely engaged in business of a private nature and that sales to it should not be beyond the reach of the taxing power of the state wherein it is located." [People *v.* Standard Oil Company of California, supra, at p. 128.]

Since the rendition of the opinion in the case of Standard Oil Company *v.* California, supra, holding a sale to a post exchange within a territory over which the state has ceded to the federal government full legislative authority, is immune from a state tax, Congress has enacted a statute which removes the immunity from taxes on sales made within a federal area. [54 U. S. Statutes p. 1059, 4 U. S. C. A. sec. 13 (a).] This change in the federal law, however, would not in any manner affect the decision in this case, as it is expressly alleged that none of the army post exchanges to which the plaintiff sold gasoline and on which it paid a tax, is located on United States military reservations, over which the federal government has exclusive jurisdiction to legislate.

For the reasons herein stated the judgment is affirmed.

CURTIS, J.

We concur:

GIBSON, C. J.
SHENK, J.
EDMONDS, J.
CARTER, J.

I concur in the judgment:

HOUSER, J.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 1125

STANDARD OIL COMPANY OF CALIFORNIA,
A CORPORATION,
Appellant,

vs.

CHARLES G. JOHNSON, STATE TREASURER OF THE STATE OF CALIFORNIA,
Appellee.

APPELLEE'S STATEMENT URGING THAT THE COURT TAKE JURISDICTION.

Appellee has read appellant's statement of jurisdiction for appeal of the above-entitled cause to the Supreme Court of the United States and desires to join in such statement. Although appellee believes that the decision of the Supreme Court of the State of California is correct, appellee believes that the decision concerned a substantial Federal question proper for review by the Supreme Court of the United States.

The particular problem of the status of post exchanges is now causing great difficulty in the administration of various statutes of the State of California and appellee believes the same is true in other states. Although there has always been considerable confusion in regard to this matter, the great expansion in number and size of post

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exchanges has resulted in near chaos in the administration of statutes, such as, sales, use and gasoline taxes and motor vehicle regulation. Subsequent to the decision of the Supreme Court of the State of California, the Attorney General of California has endeavored to obtain the cooperation of the post exchanges located in California in the administration of the statutes of this State on the basis of that decision. The officers attached to the Judge Advocate General's staff stationed in this State have informed the Attorney General that they do not regard the decision of the Supreme Court of the State of California as controlling and post exchanges have therefore refused to follow said decision in its application to the various statutes. Unless the Supreme Court of the United States makes a determination whether post exchanges are instrumentalities of the Federal Government this difficult situation will continue and inevitably numerous suits will continue to be instituted throughout the various States directed toward an effort to obtain such a determination. Appellee, for the reasons stated above, urges that the Supreme Court of the United States take jurisdiction of this question.

Dated: March 21, 1942.

Respectfully submitted,

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